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June 6, 2016

Hon. Glenn A. Grant, J.A.D.
Acting Administrative Director of the Courts
Comments on Bail Judge Subcommittee Report
Hughes Justice Complex
PO Box 037
Trenton, New Jersey 08625-0037

RE: Bail Judge Subcommittee Report

Your Honor:

Please accept this letter in response to your request for comments to the "February 2016 Report of the Bail Judge Subcommittee of the Conference of Criminal Presiding Judges," published May 9, 2016. I represent the interests of ABC Bail Bonds, Inc., a licensed agent of Lexington National Insurance Company. The comments I submit are my own, submitted on behalf of my client.

I also write as a member of the bar of this state for 40 years, a former municipal prosecutor, county assistant prosecutor, deputy attorney general, county counsel, current member of both the National Association of Criminal Defense Lawyers and the Association of Criminal Defense Lawyers of New Jersey, a Certified Criminal Trial Attorney, and a taxpayer. Most importantly, I represent the interests of literally thousands of clients, past, present, and future, who have faced and will continue to endure indefinite detention in an underfunded criminal justice system.

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The Subcommittee Report represents the latest in a string of agonized analyses of persistent dysfunction in our bail and detention systems, adding to the oeuvre of the Supreme Court, the legislature, and the State Commission of Investigation.¹ The Report's genesis is difficult to discern, reciting an effort to "identify problems in the bail bond system and in the bail forfeiture recovery process." Despite the best efforts of those responsible for drafting and research, the Report recites an incomplete and ultimately inaccurate history of how bail has evolved in New Jersey over the last half century. To be sure, where history and goals aren't fully understood, confusion inevitably leads to proposed rule changes that, while well-intentioned, will eviscerate the commercial bond industry, lengthen pretrial detention for a larger percentage of defendants, and promote the administrative glut that threatens even now to grind our criminal justice system to a halt.

The Committee are presumed well meaning. Judges share the same frustrations as the other stakeholders in the criminal justice process. The time from arrest to indictment, indictment to plea or trial, and plea or trial to sentencing, is unconscionably long.² With roughly ninety-seven percent of all state criminal cases resolving by plea or other disposition, the jury trial itself is on the verge of becoming vestigial.

But the interests of stakeholders vary widely. Defendants are supposed to enjoy the most deference in our system, as they are cloaked in a costume of constitutional rights, described below. Defense lawyers zealously protect those rights. Prosecutors are charged with enforcing the law swiftly, but fairly, in the pursuit of justice. Judges are charged with protecting the public's interest, including crime victims in particular, society in general, and the integrity of the courts above all. Nowhere in that scheme is there call or indeed room for a profit motive. Arguably, the mere presence of a profit motive is antithetical to protection of constitutional rights.³

¹ See, e.g., the Report of the Joint Committee on Criminal Justice (the "Rabner Report" March 10, 2014); N.J.S. 2A: 162-12, (1994; 2003 Amendments; 2007 Amendments; 2011 Amendments; 2013 Amendments); N.J.S. 2A:162-15 et seq. (effective Jan. 2017); State Commission of Investigation report ("Inside Out," May, 2014)

² The United States Supreme Court recently had to rule on a constitutional challenge under the Speedy Trial clause in a protracted pre-sentence scenario, 14 months between plea and sentencing due to "institutional delay," see, *Betterman v. Montana*, No.14-1457, ___ U.S. ___ (2016).

³ The kind of punishment one receives should not depend on the amount of money one has. *Tate v. Short*, 401 U.S. 395 (1971). See also, the ABA review of the Department of Justice's report on municipal court practices in Ferguson, MO, "focus on generating revenue" in the municipal court system, at 5.

http://www.americanbar.org/content/dam/aba/administrative/judicial_independence/2015_Forum_Materials.authcheckdam.pdf

Hon. Glenn A. Grant, J.A.D.

June 6, 2016

Page 3 of 14

At the risk of sounding like the proverbial broken record, I continue to maintain that full funding of our judiciary must precede any reform for that reform to be meaningful. In plainest terms, we desperately need more judges, more courtrooms, more prosecutors and public defenders, all coupled with staff necessary to carry out the increasingly crushing workload. In 2014, I submitted comments to the Supreme Court's proposed bail reform plan, including the following statistical excerpt:

“Over the five years 2008-2012, New Jersey saw felony criminal filings average between 102,000 and 111,000 per year, with similar numbers for disposition statewide. *Drug Policy Alliance/Luminosity Report*, at 7 (citing New Jersey Administrative Office of the Courts Court Management Statistics, 2012.) By comparison, the entire federal court system in all 50 states and territories, processed (filings and dispositions) roughly 90,000-100,000 cases in the same time frame. *See*, Administrative Office of the United States Courts, Annual Report of the Director 2013, available at <http://www.uscourts.gov/Statistics/JudicialBusiness/2013/us-district-courts.aspx>. New Jersey's felony caseload actually exceeds the United States District Courts in their entirety. Those federal judges (currently 677 nationwide) handle roughly 135-140 cases per judge. *See*, Administrative Office of the United States Courts, Annual Report of the Director 2013, available at <http://www.uscourts.gov/Statistics/JudicialBusiness/2013/status-article-iii-judgeships.aspx>. Our criminal division currently lists 92 full time judges, plus another eight retired and on recall. *See*, NJ Lawyers Diary and Manual, 2014 ed., pp. 44-74. ***In other words, for a slightly smaller caseload, the United States government funds seven times the number of judges.***

“Senior judges (the federal equivalent of retired and on recall), not counted above and recently estimated to account for disposing of 21% of federal filings, plus more than 500 full time magistrate judges handling everything from bail and detention hearings to civil pretrial discovery and motions, easily offset any diminution in output of district judges, who are handling civil trials as part of their caseload. Administrative Office of the United States Courts, Annual Report of the Director 2013 available at <http://www.uscourts.gov/Statistics/JudicialBusiness/2013/appointments-magistrate-judges.aspx>. Indeed, criminal part judges in New Jersey have their own collateral caseload, including expungements, Megan's Law hearings, municipal appeals, petitions for post-conviction relief, emergent duty, and bail reviews. The comparison in judges' net criminal caseloads is apt.” *See*, Furlong, *Rabner Committee Response*, comment letter to Judge Grant, 5/19/14. (Emphasis supplied.)

The judges in this state are working longer hours on more cases with more mandatory record keeping than ever before, at no increase in compensation. Perfectly qualified jurists are retiring at their earliest opportunity to reclaim some semblance of normalcy in their lives, and no private practitioner can blame them. Until this critical shortage of resources gains traction with the legislature, we are all engaged in a fool's errand that makes the Myth of Sisyphus look downright productive.

How The Bail Industry Operates.

Bail bondsmen and bondswomen represent but one aspect of the criminal justice process, private agents responsible for producing defendants in court when ordered. Precisely contrary to a government agency, private businesses, including surety companies, *are* driven by a profit motive. They do not subsist on taxpayer funds. Instead, they generate revenue from defendants and their families in the form of premiums on the performance bonds the surety issues to the government. They sell insurance.

The public policy debate on criminal justice “reform” recognizes the economic imbalance inherent in the bail bond system. Largely indigent defendants tap limited resources from their economically distressed communities to underwrite their freedom from pretrial detention for months and more often years. The dollars transferred from defendants to bail companies have on paper increased in New Jersey every year, if only because bails set by our judiciary have risen astronomically.⁴

“On paper” is an important distinction, because defendants could not possibly keep up with the increased bail sets. Recognizing this gap, several bonding companies aggressively marketed themselves as offering small down payments on the once sacrosanct 10% premium, balance due via promissory notes of uneven length and no interest. The remainder of the industry had little choice but to compete with this model.

This discounting of up front premiums, coupled with a robust collection practice to reap the remainder, actually promotes bail agents’ supervision. Every time an agent writes a bond, his commission depends on the revenue generated. His aggressive follow up to remind a defendant to make a payment increases the number and substance of the agent-defendant contacts.

In that same vein, bail bond companies have enormous incentive to assure defendants’ appearance in court. The result of even a single failure to appear is a lengthy process including fugitive recovery, remittitur motion practice, forfeiture penalty, then added collection practice to recover the fees and judgments incurred along the way. All of those costs are passed along to the defendant and his guarantors (family, friends, co-workers, even distant relatives.) This indemnification scenario exists in every bail bond written, guaranteed by those signatories. Query whether those public policy advocates who rail against the transfer of funds from defendants to bail bondsmen would endorse the Subcommittee’s call for more revenue from the forfeiture process, an even more random crapshoot than the setting of bail in the first instance.⁵

⁴ Beyond the AOC’s bail schedules, the common experience of the defense bar has been a steady, steep rise in the last decade, rendering the \$2,500 limit on disorderly persons offenses and fourth degree crimes almost quaint. See, N.J.S. 2C:6-1.

⁵ The randomness of FTA/forfeiture litigation topics include breakdowns in the notice systems, warrant levels, arrest authority of fugitive recovery agents, and inability to quantify injury to the criminal justice system when a defendant fails to appear.

The Rights of Criminal Defendants.

The “Legal Underpinnings” section of the Subcommittee report reminds us that bail is both a federal and constitutional right. The words “presumption of innocence” do not appear in either federal or state constitutions, but they are inferred from the right to bail. The relevant constitutional provisions are as follows. These rights, enshrined in Article I of the New Jersey Constitution, mirror those recited in the federal Bill of Rights, Amendments I-X of the U.S. Constitution:

N.J. Const., Article I

10. In all criminal prosecutions the accused shall have the *right to a speedy and public trial* by an impartial jury....

11. No person shall, after acquittal, be tried for the same offense. *All persons shall, before conviction, be bailable by sufficient sureties*, except for capital offenses when the proof is evident or presumption great.⁶

12. *Excessive bail shall not be required*, excessive fines shall not be imposed, and cruel and unusual punishments shall not be inflicted. (Emphasis supplied.)

The United States Constitution places strict limits on the government's ability to imprison those who have been accused of crimes. A person charged with a crime is presumed innocent. “Unless [the] right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning.” *Stack v. Boyle*, 342 U.S. 1, 4 (1951). The New Jersey Constitution goes even further, formally guaranteeing the right to bail before conviction. “All persons shall, before conviction, be bailable by sufficient sureties....” N.J. Const., Article I, Section 11.

Punishment comes only after conviction by proof beyond a reasonable doubt. *In re Winship*, 397 U.S. 358 (1970). In limited circumstances, pretrial detention is permitted on a showing that the defendant poses a danger to the community or is likely to flee before a trial can be held. 18 U.S.C. § 3142; *United States v. Salerno*, 481 U.S. 739 (1987) (time-limited pretrial detention on basis of future dangerousness is constitutionally permissible). Under our constitutional scheme, preventive detention has been and should remain the exceptional practice:

“[I]t is well to remember the magnitude of the injury that pretrial detention inflicts and the departure that it marks from ordinary forms of constitutional governance. Executive power to detain an individual is the hallmark of the totalitarian state. Under our

⁶ The right to bail has been curtailed by constitutional amendment effective January 1, 2017 as is more fully explored in the Subcommittee’s Report. However, the revised Article I, Section 11 does not address the rights recited in preceding and succeeding sections, parallel to the Sixth and Eighth Amendments to the U.S. Constitution.

Hon. Glenn A. Grant, J.A.D.

June 6, 2016

Page 6 of 14

Constitution the prohibition against excessive bail, the Due Process Clause of the Fifth Amendment, the presumption of innocence—indeed, the fundamental separation of powers among the Legislative, the Executive and the Judicial Branches of Government—all militate against the abhorrent practice. Our historical approach eschewing detention prior to trial reflect these concerns....” *United States v. Montalvo–Murillo*, 495 U.S. 711, 723–24 (1990) (Stevens, J., dissenting, joined by Brennan and Marshall, JJ.) (footnotes omitted).⁷

Without collecting the “strict scrutiny” cases, we should recognize that any infringement on a constitutional right is and indeed should be suspect under our scheme of ordered liberty. What’s relevant here is the importance of judges imposing the least amount of punishment necessary to guarantee a defendant’s appearance. And make no mistake, enforcement of forfeiture is a form of punishment for contempt, too often approved with little awareness of how due process rights of defendants get misplaced.

Title 2A: Chapter 162, Bail and Recognizances.

Against this constitutional backdrop, the next tier of importance in our jurisprudence is statutory. N.J.S. 2A:162-1, et seq. defines the reach of bails and recognizances. There is a six-year statute of limitations for seeking a judgment on forfeiture (N.J.S. 2A:162-5), and a four-year statute of limitations for seeking remission of forfeiture (N.J.S. 2A:162-8). This same chapter endows the Supreme Court with the power to adopt rules to determine the “sufficiency of bail,” (N.J.S. 2A:162-14).

The Supreme Court has done that in morbid detail, supplementing the recognized forms of recognizance (personal, monetary, real property, and cash) with a judicially crafted 10% program: “In any county, with the approval of the Assignment Judge, a program may be instituted for the deposit in court of cash in the amount of 10 percent of the amount of bail fixed.” R. 3:26-4(a).

It is fair to ask, then, why all the “problems” identified in the current system point towards surety bonds. One would reasonably expect release options to be evenly distributed amongst the five forms of recognizance, absent some weighting factors that would create an imbalance. This is where history becomes important.

The report cites the *Hyers* factors as bedrock of the law of forfeiture remission, when in fact *Hyers* was an outlier on an obscure question of whether return of a fugitive after entry of judgment would result in a categorical return of funds (minus costs), or

⁷ The recently approved constitutional amendment replaces bail (posting of money, property, or simply your good name) with controlled release. Release under the tutelage of pretrial services officers will severely restrict the freedom of those presumed innocent, and subject them to punishment (detention) for failure to comply with conditions imposed to obtain their release. This scheme, costing hundreds of millions of dollars, will impose substantial and disproportionate hardship on young men of color.

Hon. Glenn A. Grant, J.A.D.

June 6, 2016

Page 7 of 14

would be denied without consideration of the equitable factors in play. The Appellate Division rejected both categorical approaches and remanded for a hearing to review equitable factors. *State v. Hyers*, 122 N.J. Super. 177 (App. Div. 1973). Mr. Hyers had been on bail pending appeal, one of the few examples of defendants on bail bonds in the 1970's. The vast majority of defendants in the quarter century leading to the adoption of N.J.S. 2A:162-12 were released on their own recognizance or on 10% cash alternatives.

Both surety's counsel and county counsel in *Hyers* were prepared to settle the matter with return of funds minus costs, because that's what the relevant statute called for:

"When any court which has ordered or shall order the forfeiture of a recognizance, the amount whereof has been or shall be paid into the county treasury of any county in accordance with law, shall thereafter, in its discretion, order the return of the moneys so paid upon the forfeited recognizance, the treasurer of *the county shall thereupon repay the amount of such recognizance, less the taxed costs on the proceedings to forfeit the same*, to the recognizor or recognizors or the personal representatives of any deceased recognizor, who shall have paid the same into the county treasury. Application for a return of moneys so paid shall be made to the court within 4 years after the recognizance shall have been declared forfeited." N.J.S. 2A:162-8 (Emphasis supplied.)

In *Hyers*, the trial judge relied on the phrases "in its discretion" and "the interests of justice" to deny any remission, without holding a plenary hearing. "As we read the record, the trial judge appears to have determined that a decision as to whether the 'interest of justice' will be served requires only a consideration of whether there has been some excuse for the nonappearance of defendant. We find this interpretation of R. 3:26-6(b) to be too restrictive." *State v. Hyers*, 122 N.J. Super. 177, 180 (App. Div. 1973).

The *Hyers* factors remained in a state of legal desuetude for over twenty years. During that time, defendants, except those living out of state or judicially determined to present a serious flight risk, were released on 10% bonds (a payment by the defendant or his guarantors of 10% of the bond amount directly into the county treasury, which sum could be returned upon the conclusion of the case, a direct, monetary incentive for defendants to appear.)⁸

In 1993, the legislature passed the "Crimes with Bail Restrictions" statute, N.J.S. 2A:162-12, and the modern bail bond industry was born in New Jersey. In the 1990's, crime control occupied both local and national consciousness. The federal Violent Crime

⁸ "Indeed, the very program here being considered acknowledges the desirability of a less than universal application of the 10% Cash bail program. Expressly excluded from its operation are 'cases involving persons from out of state charged with violations of (1) municipal ordinances, (2) disorderly persons statutes or (3) motor vehicle laws.'" *State v. Casavina*, 163 N.J. Super. 27, 30 (App. Div. 1978)

Hon. Glenn A. Grant, J.A.D.

June 6, 2016

Page 8 of 14

Control Act of 1994 might be the most politically contentious example, replete with complaints about “super predators” that led to substantial increases in incarceration of certain populations. By eliminating 10% bonds for the majority of crimes charged, the legislature signaled entry to out of state surety companies, and courts adjusted to the new normal.

The dislocations were almost immediate. Courts saw a brief spike in real property bond postings, where family members would obtain a letter from a licensed real estate agent as to the value of a home, then post that property to secure a defendant’s release. This practice fell predictably into disfavor, and the legislature moved quickly to remediate the “problem” of arbitrarily inflated property values. *See*, N.J.S. 2A:162-12(c), mandating *inter alia* an appraisal from a certified appraiser coupled with updated title and lien information commensurate with a dry closing on a new mortgage. The cost of the appraisal from a licensed appraiser alone raised the cost of posting real estate to the point where it became simply cheaper and quicker to buy a bail bond.

Bail bonds steadily increased, as both a percentage of release options and in the amount of bond for reasons that have not been studied.⁹ Courts reduced their reliance on the 10% option, the time and manner of placing a property bond became time and cost-prohibitive, and the amounts of bonds themselves made an all-cash posting all but impossible. Within ten years of the adoption of “crimes with bail restrictions,” a defendant not released on his own recognizance and unable to afford his bail set stood little chance of gaining his release prior to trial.

Out of other options, defendants sought bail bonds despite their steep cost, because the time from arrest to disposition was climbing just as quickly as the bails themselves. With the increasing population of applicants for bail, with a county jail infrastructure unable to accommodate the ever larger number of detainees, and with bondsmen under pressure to write more bails at lower up front premiums to keep their collection models afloat, increased risk of non-appearance was inevitable. Add to that a strong correlation between time at large and risk of non-appearance (or commission of new crime while on bail), and the results were entirely predictable.

Still, it bears emphasizing that failures to appear (“FTA”) for any reason have remained steady or declined slightly in the same time frames of the BJS report.¹⁰ From a high of about 24% to a more recent average of 21%, the gross FTA numbers do not

⁹ The Bureau of Justice Statistics has compiled national data without attempting to explain it. Perhaps the sharpest example of changing release conditions was this: “The trend away from non-financial releases to financial releases was accompanied by an increase in the use of surety bonds and a decrease in the use of release on recognizance (ROR) (figure 2). From 1990 through 1994, ROR accounted for 41% of releases, compared to 24% for surety bond. In 2002 and 2004, surety bonds were used for 42% of releases, compared to 23% for ROR.” *Pretrial Release of Felony Defendants in State Courts, 1990-2004*, found at, <http://www.bjs.gov/content/pub/pdf/prfdsc.pdf>.

¹⁰ BJS report, at 8. The charts and graphs can be misleading, if only because terminology differs slightly from state to state.

Hon. Glenn A. Grant, J.A.D.

June 6, 2016

Page 9 of 14

distinguish willful failures by defendants. That is, many defendants fail to appear because they did not receive proper notice, failed to give notice of a change of address, got arrested or detained in another jurisdiction, got injured, hospitalized or killed, or for some other reason did not intentionally ignore an order to appear. The national unexcused FTA rate is closer to 12-15%.¹¹ All of which brings us to the question: then what?

Fugitive Recovery.

When a defendant fails to appear, prosecutors know immediately. In most cases, defense attorneys know as well. In some cases, counsel for the State or defendant are unaware of a court event, yet defendants are the only parties who suffer a legal consequence. Notice of scheduled events is not nearly as uniform or efficient as courts like to think. Because neither the private defense bar nor bail bondsmen have access to Promis/Gavel, their inability to confirm court dates promptly only compounds the problem. There are several choke points in the notice process where a bondsman is forced to rely on the defendant for information on a next court event (PIC, PAC, and PTI violations, to name three), when an email to the surety of record might reduce FTA's significantly.

As things stand, bondsmen get notice of defendant's failure to appear by regular mail to the insurance company, which forwards the document to the agent. In some cases, weeks, months, even years can elapse before the bondsman knows his client is a fugitive. The time elapsed between FTA and receipt of notice is often critical to a prompt resolution, because the longer a fugitive is at large, the more resources and time he has to avoid arrest. Same day email notice of a defendant's failure to appear would dramatically reduce forfeiture litigation.

Upon receipt of notice, bondsmen assign the case to fugitive recovery, whether in-house or via independent contractors. Those recovery agents have standard fees for apprehension: 10% of the gross bond amount in state; 20% out of state; additional fees where an apprehension is particularly difficult or requires extraordinary expenses. These other expenses include Internet-serviced background checks, rewards to informants, and subcontractors with special skills. Bail companies pay those fees and costs, but as a purely practical matter, cannot recover them from a defendant, by order of the New

¹¹ A 2011 paper funded by the USDOJ studied FTA rates in Nebraska, adjusting for types of notice given to defendants, including a timely reminder when a court appearance was upcoming. The positive appearance numbers were eye-opening: "Specifically, the FTA rate was 12.6% in the control condition, 10.9% in the reminder-only condition, 8.3% in the reminder-sanctions condition, and 9.8% in the reminder-combined condition. The FTA rate was higher for some categories of misdemeanors than others, and for defendants with multiple charges (15.4% if two or more charges, versus 5.4% for one charge)." Table, 14. <https://www.ncjrs.gov/pdffiles1/nij/grants/234370.pdf>.

Hon. Glenn A. Grant, J.A.D.

June 6, 2016

Page 10 of 14

Jersey Department of Banking and Insurance.¹² These are the only expenses not routinely passed along to the defendants and their guarantors.

Fugitive recovery itself has become a highly regulated, licensed business, monitored by the New Jersey State Police, and now subjecting recovery agents to criminal prosecution if their conduct towards a fugitive crosses a routine threshold:

“a. Any person who is required to be licensed pursuant to the provisions of this act who enters any premises or dwelling without license or privilege or who employs the use of unlawful force in engaging in or assisting in the apprehension, arrest, detention, confinement, surrender, securing or surveillance of any person who has violated the provisions of N.J.S.2C:29-7 or has failed to appear in any court of law in this State or any other state, when so required by law, or has failed to answer any charge, subpoena or court ordered inquiry, when so required by law, shall, in addition to any other criminal penalties provided under law, be guilty of a crime of the fourth degree.” N.J.S. 45:19-37.

“a. ‘Unlawful force’ means force, including confinement, which is employed without the consent of the person against whom it is directed and the employment of which constitutes an offense or actionable tort...” N.J.S. 2C:3-11.

In other words, add fear of criminal prosecution, tort liability, and administrative action to revoke a license to the list of things fugitive recovery agents prefer not to confront in apprehending a fugitive.

Still, fugitive recovery success remains high, especially when information can be shared with local law enforcement in order to make a lawful arrest. It would substantially enhance the recovery model if courts and county counsel would acknowledge this state of affairs and credit fugitive recovery efforts that lead to an arrest, as opposed to giving special credit only to agents who make the arrest themselves.

Although perhaps a topic for another study, if courts would support agents who wish to surrender defendants prior to a failure to appear, FTA's would be taken down another notch. Agents often learn in advance, mostly from guarantors who fear the economic consequences of forfeiture, of a defendant's intention to flee the jurisdiction. Efforts to raise or revoke a defendant's bail after he changes address, buys a plane ticket, or stops meeting his lawyer are typically met with perplexity from the bench. Courts often assume that absent a motion from the prosecutor to increase or revoke bail, judges have no authority to act. But the surety bond is a three-cornered promise involving the defendant, the surety, and the court. Modifying our rules to permit a surety's direct application for relief would serve the system well.

¹² DOBI has flatly ruled out flat fee fugitive recovery payments, requiring instead that the underwriter document all out of pocket expenses for mileage, tolls, service providers, etc., tabulation of those expenses for inspection, then a separate collection process that must be initiated by the underwriter. Because underwriters nationally have no facility for performing these tasks, there is no practical mechanism for recouping these expenses.

Remission of Forfeiture.

The Bail Subcommittee's deliberations, by its reported description, suffered a fundamental disconnect on the purpose and enforcement of bail contracts, in some respects echoing the State Commission of Investigation's own failure to appreciate basic concepts in insurance underwriting. To begin with, insurance is not a profit center for government agencies, so the notion that county counsel are collecting insufficient amounts on remission applications is hard to digest. The system that works best collects no revenue, because defendants always appear.

Second, because all bail contracts contain indemnification agreements with defendants *ab initio*, query whether any financial penalty imposed by the court that bears no relationship to the damages suffered by the government owing to a defendant's non-appearance constitutes a separate punishment implicating double jeopardy concerns. *See, United States v. Halper*, 490 U.S. 435 (1989), and *Montana v. Kurth Ranch*, 511 U.S. 767 (1994).¹³ Defendants themselves remain captioned in the forfeiture proceedings, because courts recognize it is they who have breached the terms of recognizance and will ultimately be held liable.

Consider the oft-remarked "intangible injury" inflicted on the criminal justice system: can a forfeiture exceed the maximum fine for the crime charged without running afoul of these constitutional principles? A bail set at \$30,000 on a third degree aggravated assault, where the maximum fine is \$15,000, could result in a forfeiture double the potential fine for the substantive offense. In a scheme of ordered liberty, this possible outcome seems a tad harsh.

The Subcommittee lists four topics of concern: procedures, guidelines, negotiations, and stays. On procedures: Consistent with *State v. Clayton*, procedures should follow the public interest. "We also add that *the focus of the bail forfeiture procedure is the vindication of the public interest and not primarily revenue raising.* *State v. Clayton*, 361 N.J. Super. 388, 393 (App. Div. 2003) (Emphasis supplied.)

¹³ "Criminal fines, civil penalties, civil forfeitures, and taxes all share certain features: They generate government revenues, impose fiscal burdens on individuals, and deter certain behavior. All of these sanctions are subject to constitutional constraints. A government may not impose criminal fines without first establishing guilt by proof beyond a reasonable doubt. Cf. *In re Winship*, 397 U.S. 358 (1970). A defendant convicted and punished for an offense may not have a nonremedial civil penalty imposed against him for the same offense in a separate proceeding. *United States v. Halper*, 490 U.S. 435 (1989). A civil forfeiture may violate the Eighth Amendment's proscription against excessive fines. *Austin v. United States*, 509 U.S. 602 (1993)." *Dep't of Revenue of Montana v. Kurth Ranch*, 511 U.S. 767, 778 (1994).

In practical terms, courts should take steps to speed notice to surety companies when their clients have failed to appear. A simple same day email sent by the court clerk (who emails the Sheriff's Chief Warrant Officer, so a copy will do) solves this very real problem. Next, courts should afford a brief window during which fugitive recovery agents or bondsmen can produce defendants with little or no penalty. For example, one calendar week for \$100. (This would actually be consistent with practice in several counties prior to the issuance of AOC guidelines over a decade ago.)

In the same vein, courts should entertain reinstatement of bail applications shortly after fugitive recovery. In some instances, defendants will have perfectly plausible explanations for their non-appearance, and in many of those situations, the surety will consent to reinstatement. Too often this kind of brief hearing proceeds without notice to the surety and occasionally in the absence of defense counsel.

The 75-day window between declaration of forfeiture and entry of judgment started at 45 days, but was extended by Chief Justice Poritz to deal with the often-tardy notice procedures. By giving same-day notice to the bondsman, courts could consider reducing the time frame for entry of judgment. The tradeoff should be a more generous remission guideline for filing a motion post-fugitive recovery, prior to the entry of judgment. Judge Pressler pegged that guideline at 100% in *Clayton*.¹⁴ This cost-free return window stands at 180 days in Connecticut, a state cited by the Subcommittee as a model worthy of comparison.¹⁵ Because the Subcommittee appears to have drawn heavily on the Connecticut model, this automatic stay aspect cannot be overstressed.

Finally, the court should be permitted to weigh in on the "warrant level" fixed by the executive branch. From time to time, fugitive recovery agents will track down a defendant, only to learn the warrant level is restricted to, say, 500 miles of the county issuing the warrant. Some of the horror stories involving multiple stays arose because

¹⁴ "Because the surety filed its motion prior to the expiration of the 45 day period, by operation of the rule, default judgment should not have been entered and the forfeiture should have been set aside. R. 3:26-6(b). The appropriate application of that rule would have entitled the surety, therefore, to return of 100% of its bail." *State v. Clayton*, 361 N.J. Super. 388, 394 (App. Div. 2003).

¹⁵ "(a) Whenever an arrested person is released upon the execution of a bond with surety in an amount of five hundred dollars or more and such bond is ordered forfeited because the principal failed to appear in court as conditioned in such bond, **the court shall, at the time of ordering the bond forfeited:** (1) Issue a rearrest warrant or a *capias* directing a proper officer to take the defendant into custody, (2) provide written notice to the surety on the bond that the principal has failed to appear in court as conditioned in such bond, except that if the surety on the bond is an insurer, as defined in section 38a-660, the court shall provide such notice to such insurer and not to the surety bail bond agent, as defined in section 38a-660, and (3) **order a stay of execution upon the forfeiture for six months.**" See, CT Gen Stat § 54-65a (2013) (Emphasis supplied.)

Hon. Glenn A. Grant, J.A.D.

June 6, 2016

Page 13 of 14

county counsel did not want to respond to unjust enrichment arguments that flow from these refusals to lift the warrant level even in the face of a surety's promise to pay extradition costs.

With respect to the Guidelines, greater specificity may well lead to more uniform results, if the Guidelines were made mandatory (rendering them rules, not guidelines.) However, raising the levels will serve to effectively shut down many bail bond agencies already struggling to survive in a deeply discounted market. None of this discussion tackles the question: why should the courts get more money from insurance companies for injuries not suffered?¹⁶ One persistent legislative proposal introduced in the last several sessions called for a per diem assessment consistent with the four-year statutory limit for bail remission. In other words, with 1460 days in the four year calendar, each passing day would incur a forfeiture penalty of 1/1460, resulting in a 25% forfeiture in one year. This level of specificity would wring out all negotiations between county counsel and surety lawyers, requiring instead perhaps a running assessment of forfeiture costs where production of a defendant would toll the penalty.

In that same vein, moving negotiations to the Attorney General's office would likely provide a recipe for extraordinary delay. County counsel typically have their fingers on the pulse of their counties, are able to call warrant officers, prosecutors, and local court personnel on speed dial, and have amassed institutional memory of how things work in their vicinage. This is not an idle concern. Some counties have markedly different approaches to fugitive recovery, warrant levels, and notice mechanisms, all of which can change the dynamic of a failure to appear and the equities of settlement.

This sensitivity to local control is hardly chimerical. Too often well-meaning non-lawyers or non-practicing lawyers fail to appreciate the importance of local custom and practice, leading to policy decisions of potentially disastrous dimensions. This dictum comes into bas-relief when reviewing the Connecticut model held up by the Subcommittee.

Without parsing the Connecticut bail system in painstaking detail, the Subcommittee should be aware that "written promise to appear" (66%) and "nonsurety bond" (written promise to appear with fixed bond amount but no money changing hands, 13%) represent nearly 80% of all pretrial releases in Connecticut. Surety bonds occupy 15%, cash only 6%. There are a host of other factors distinguishing the Connecticut model from New Jersey's, but those may not have been examined at all.¹⁷

¹⁶ In private insurance contracts, such claims would be regarded as fraudulent. Think of calling your homeowner's policy carrier and reporting a fire that damaged your garage, den, and laundry room, then demanding the carrier pay off the policy maximum.

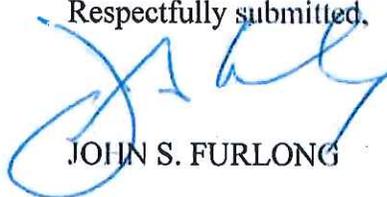
¹⁷ 2003 bail reform study commissioned by the Connecticut legislature, https://www.cga.ct.gov/2003/pridata/Studies/Bail_Final_Report.htm; see Figure 1 for the percentages cited.

Last, the prospect for limiting stay orders does not daunt the dauntless. Most stay orders can be segregated into legitimate and "other" grounds. Where a defendant has been located and/or detained in a foreign jurisdiction, where he is awaiting extradition, or completing a short out-of-state sentence, the stay order bears the mark of legitimacy. Where the defendant's whereabouts are unknown, but the fugitive recovery agency has a lead in a Central American country, the stay request falls into the "other" category.

Conclusion.

The debate over bail reform has been contentious, but less than illuminating. At the risk of subverting the issues *sub judice*, the Subcommittee's work is woefully incomplete. Before any meaningful bail reform will bear fruit, we all need to examine the cost of fully funding our criminal courts. With less than a hundred judges disposing of more than 100,000 cases annually, the numbers don't lie. We need more judges, prosecutors, public defenders, and courtrooms. Most of the concerns raised in the Subcommittee's report would evaporate with a more robust judiciary. The administration of justice has been truncated to nothing more than administration, an indictment of our entire criminal justice system. We are on the cusp of citizens losing faith in all of our institutions, as they devolve into jargon and *Jarndyce*. Perhaps our criminal courts are where we should draw the line.

Respectfully submitted,



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JSF/j